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In The

Supreme Court of the United States

October Term, 1992

OKLAHOMA COALITION TO RESTRICT ABORTION, INC., and FRED W. SELLERS, JR.,

Petitioners,

v.

NANCY FELDMAN and KIM LITTLE,

Respondents.

STATE QUESTION NO. 642

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Oklahoma

BRIEF FOR CERTAIN OKLAHOMA STATE SENATORS AND STATE REPRESENTATIVES, OKLAHOMA LEGISLATORS IN SUPPORT OF A VOTE ON STATE QUESTION 642, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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COMES NOW Oklahoma State Senators Howard H. Hendrick (Rep. Dist. 52, Bethany), Donald J. Rubottom (Rep. Dist. 35, Tulsa), Trish Weedn (Dem. Dist. 15, Purcell), Jerry L. Smith (Rep. Dist. 39, Tulsa), Jerry T. Pierce (Rep. Dist. 29, Bartlesville), Lewis Calvin Long, Jr. (Dem. Dist. 57, Tulsa), and Oklahoma State Representatives Gary C. Bastin (Dem. Dist. 94, Del City), Carolyn S. Coleman (Rep. Dist. 53, Moore), Mark T. Seikel (Dem. Dist. 96, Harrah), William R. Paulk (Dem. Dist. 92, Okla. City), and Joan Greenwood (Rep. Dist. 54, Moore), legislators in support of a vote on State Question No. 642, and submit the following brief pursuant to Sup.Ct.R. 34.

CONSENT TO FILING

Both parties have consented to the filing of this brief. Letters memorializing this consent will be simultaneously filed with this brief.

INTEREST OF *AMICI CURIAE*

Amici Curiae are members of the Oklahoma State legislature. In general, *amici's* interest is that the opinion below has improperly interfered with the exercise of legislative powers by censoring core political speech. Although this interference is with the initiative legislative process, the rationale for the Oklahoma Supreme Court decision below striking down a proposed law applies with equal force to the representative legislative process. The majority implied as much:

> [W]e are required to find the initiative petition unconstitutional. We also find that an examination of the constitutionality of the initiative petition is necessary, both to avoid misleading citizens about the legal effect of the proposition upon which they may vote, and to avoid a costly election which would ultimately be an exercise in futility. [Nevertheless this ruling does not prohibit the circulation of a proper initiative petition **or of legislation which passes constitutional muster.**]

In Re: Initiative Petition No. 349, 838 P.2d 1, 3, 61 U.S.L.W. 2102 (Okla. 1992).[1] The emphasized language implies that the judiciary claims the power to prohibit the legislature from voting on proposed legislation submitted by state legislators that fails to pass the Oklahoma Supreme Court's "constitutional muster." Although this implication is tempered by subsequent distinctions,[2] the threatened usurpation is not specifically rejected and the distinctions are not material. Although the initiative and representative legislative processes are certainly different, the rationale for the judicial interference is the same, to-wit: those who legislate – whether the people or their representatives – should not be allowed to waste their time in divisive arguments considering and voting on

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[1] A copy of the opinion is reprinted in Petitioners' Appendix at pages 1a to 52a.

[2] "Many of the hurdles built into our legislative structure do not apply to initiatives and referendum: namely, passage by both houses, legislative committee consideration, and the availability of a gubernatorial veto. These are two very different processes and the proponent's efforts to confuse them are misplaced." *In Re Initiative Petition No. 349*, 838 P.2d at 11.

proposed laws that conflict with the federal constitution. When the unconstitutionality of proposed legislation is "manifest," it "is both appropriate and necessary to avoid a costly and useless" vote for the judiciary to strike the proposal from consideration by the legislature. *See Id.* at 2-3.

In considering Initiative Petition No. 349 ("IP349"), the majority of the Oklahoma Supreme Court behaved not as impartial jurists, but as a politicized group imposing their will to control public debate. The *amici*, as legislators, may not limit core political speech directly and the judiciary may not do so indirectly by misconstruing state laws to violate rights protected by the federal constitution. States and their courts may not opt out from the protections of the First Amendment. The opinion below is a threat to the speech and debate indispensable to the legislative powers constitutionally reserved[3] by the citizens of Oklahoma and delegated, in part, to elected representatives like the *amici*.

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[3] "All political power is inherent in the people . . . " Okla. Const. art. II, § 1. "The people have the right . . . to apply to those invested with the powers of government for redress of grievances by petition . . . " Id. at § 3. "No power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage by those entitled to such right." Id. at § 4. "The Legislative authority of the State shall be vested in a Legislature . . . but the people reserve to themselves the power to propose laws and amendments to the Constitution . . . " Id. at art. V. § 1.

STATEMENT OF THE CASE

On June 29, 1990, petitioners filed an initiative petition that was assigned number 349. The text of the proposed law became State Question 642. Under Oklahoma law, petitioners had 90 days to obtain signatures equal to or greater than 8% of the legal voters who cast ballots "at the last general election for the State office receiving the highest number of votes at such election." Okla. Const. art. V, § 2. On September 27, copies of IP349 with 106,537 signatures affixed were filed with the Oklahoma Secretary of State.

On December 17, the Oklahoma Supreme Court entered an order directing publication of notice that IP349 had been filed and that protests must be received within 10 days. The notice was published December 26 and on December 31 the respondents, Nancy Feldman and Kim Little, protested the legal sufficiency of the petition, *inter alia*, because "as drafted, [it] violates the Constitution of the United States."[4]

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[4] Pet. App. at 99a, para. 10. Under this particular segment of their protest, Feldman and Little list 9 separate alleged constitutional infirmities. This laundry list exemplifies the burdens that can be imposed by protest of legislative proposals. Without an actual factual controversy, speculation about how a proposed law might impinge on an interest are virtually limitless and unfocused. *See e.g. In Re Initiative Petition No. 349*, 838 P.2d at 21-23 (Opala, C.J., dissenting) ("The concept of standing focuses on whether the party invoking the court's jurisdiction has a legally cognizable interest in the outcome of the controversy. A party seeking relief must show actual or threatened injury of some kind. The inquiry is whether *the party has in fact suffered injury to a legally protected interest within the contemplation of statutory or constitutional provisions.*") (emphasis in original, footnotes omitted).

However, 448 days later, on March 23, 1992, Feldman and Little filed a brief stating that the "[T]he protestants hereby withdraw their federal and state constitutional claims." Thereafter, "an opinion approving the initiative petition [IP349] for submission to a vote of the people . . . [was] prepared and considered" by the Oklahoma Supreme Court "and was in the process of being readied for publication." Pet. App. at 94a. However, this opinion was never filed nor published because on July 14, the acting vice chief justice, *sua sponte*,[5] entered an order "in the interest of fairness"[6] on a 5-to-4 vote directing the "proponents, the protestants, and the Attorney General"[7] "to submit simultaneous briefs . . . within ten (10) days . . . addressing *Planned Parenthood* [*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S.Ct. 2791, 120 L.Ed.2nd 647 (1992)] and its impact on the constitutionality of the proposed ballot title and **the substance** of" IP349. Pet. App. at 89a (emphasis added).

When the Oklahoma Supreme Court ignored the petitioners' suggestion that the court had no jurisdiction to enter the July 14 order because all federal and state

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[5] No party requested this order ("neither the proponents nor the protestants have asked us to address . . . [*Casey's*] impact on the important constitutional issues." Pet.App. at 94a).

[6] *In Re Initiative Petition No. 349*, 838 P.2d at 3.

[7] The Attorney General has no statutory role in protests to the legal sufficiency of an initiative petition. "Neither the State, nor any agency, officer, or employee was a party in the case below." *State of Oklahoma's Motion for Leave to Intervene*, p. 3, para. 3. *See also*, "Brief in Opposition of Intervenor, the State of Oklahoma," p. 18. The petitioners' objection (Pet. App. at 79a) to this invitation was denied by the Oklahoma Supreme Court in a separate order filed August 14, 1992.

constitutional claims had been withdrawn and the protest period had expired, simultaneous briefs were filed July 24 by petitioners, by Feldman and Little, by other protestants who had only challenged the numerical sufficiency, by the Attorney General, as well as by numerous *amici curiae* who had not previously appeared.[8]

Eleven days later, the Oklahoma Supreme Court entered a 5-4 opinion[9] that State Question 642 "could not withstand a constitutional challenge" and ordered it "stricken from the ballot" to protect the people from a "costly, fruitless and useless election."[10]

SUMMARY OF ARGUMENT

The implications from how the Oklahoma Supreme Court decided the case below are clear. The majority simply abandoned their judicial functions to egregiously interfere with political speech necessarily attendant to the legislative process.[11] The "decision *trumps political process*

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[8] The suddenly appearing *amici* included *federal* legislators (a Senator, two Representatives, and a former Representative) and law professors from various states who were represented by New York attorneys.

[9] The four dissenters were the same as those dissenting from the July 14 order. Although several dissenting opinions were filed, the gist of their argument was that the issue decided was not justiciable.

[10] *In Re Initiative Petition No. 349*, 838 P.2d at 12.

[11] "The powers of the government of the State of Oklahoma shall be divided into three separate departments: The Legislative, Executive, and Judicial; . . . neither shall exercise the powers properly belonging to either of the other." Okla. Const. art IV, § 1.

rather than law." In Re Initiative Petition No. 349, 838 P.2d at 27 (Opala, C.J., dissenting) emphasis in original). A legislative initiative had been on file for nearly two years,[12] when the majority seized an opportunity to cloak their judicial invasion of core political speech with a patina of legitimacy. Because the only federal constitutional challenge had already been withdrawn, no issue about the constitutionality of the proposed law was pending when the Oklahoma Supreme Court acted on August 4th.[13] The purported reason for the *sua sponte* order on July 14 and the putative basis for the opinion promptly issued 11 days later on August 4th was the *Casey* decision. *Casey* was hardly justification for a renewed look at the federal constitutionality of State Question 642. *Casey* did not expand a woman's right to an abortion, but rather contracted the right by overruling prior decisions. *See Casey,* 112 S.Ct. at 2822 ("The conclusions reached by a majority . . . require us to OVERRULE in part some of the court's past decisions. . . . "). If State Question 642 was inconsistent with the federal constitution after *Casey,* it certainly was so immediately before *Casey.*

Whatever the real motives of the majority of the Oklahoma Supreme Court, their expressed reasons for

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[12] At the end of this period, the panel changed. Justice John B. Doolin resigned May 1, 1992. Joseph M. Watt was named to the vacancy May 19 and was sworn in June 1, 1992. Justice Watt voted with the majority.

[13] "It appears that all parties in this case want the initiative petition submitted to a vote of the people only to be thwarted by this court's *sua sponte* injection of the constitutional issues." *In Re Initiative Petition No. 349,* 838 P.2d at 14 (Hodges, V.J., concurring in part, dissenting in part, with whom Hargrave, J., joins).

interfering with the legislative process are direct attacks on core political speech, a prior restraint thereon, and hence violate protections guaranteed by the United States Constitution under the First and Fourteenth Amendments.

ARGUMENT

As the dissenters have pointed out, the Oklahoma Supreme Court decided an issue without a pending case or controversy.[14] No party had standing to raise any constitutional challenge;[15] for that matter, no party was pursuing such a challenge. In *sua sponte* injecting itself into the legislative process, the Oklahoma Supreme Court has seriously abused the judicial power, undermined the "Legislative authority of the State," and abridged the liberties of the citizens of Oklahoma. However, just as importantly, the opinion has resulted in a prior restraint on core political speech. This court should grant the writ

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[14] E.g., "The issue of the constitutionality of the measure proposed by the initiative petition was not initially briefed by the parties. In fact, protestants withdrew their constitutional claims. Thus, the issue is not properly before the court and should not be the determining factor in denying the people their right to vote." *In Re Initiative Petition No. 349*, 838 P.2d at 14 (Hodges, V.C.J., dissenting).

[15] A protest to the legal sufficiency of an initiative petition must "be filed within ten (10) days after publication [of notice]. . . . No objection to the sufficiency shall be considered unless the same shall have been made and filed as provided herein." Okla. Stat. tit. 34, § 8 (1991).

and give summary relief for this serious breach of fundamental rights protected by the First and Fourteenth Amendments.

The power to control legislative speech and debate is the power to legislate. This fundamental axiom was clearly understood by the Founding Fathers, who provided that federal senators and representatives "shall not be questioned in any other place" "for any speech or debate in either house." U.S. Const., art. I, § 6. Oklahoma has adopted a *verbatim* protection of legislative speech and debate. Okla. Const., art. V, § 22. In fact, the common-law meaning of the "freedom of speech" is that it "referred not to a civil right, but to a parliamentary privilege." Forest McDonald, "*Novus Ordo Seculorum*," p. 46 (Univ. Press of Kan., 1985). What could be more central to the speech and debate about legislation than the substance of the proposed law? In *Kilbourn v. Thompson*, 103 U.S. 168 (1880), this court quoted with approval the following excerpt from Chief Justice Parsons' opinion in *Coffin v. Coffin*, 4 Mass. 1 (1808).

> These privileges [legislative speech and debate] are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I, therefore, think that the article ought not to be construed strictly, but liberally, that the whole design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate, but will extend it to the giving of a vote, to the making of a written

> report, and **to every other act resulting from the nature and in the execution of the office.**

Kilbourn v. Thompson, 103 U.S. at 203 (emphasis added). Mr. Justice Story is quoted as saying, " 'The next great and vital privilege is the freedom of speech and debate, without which all other privileges would be comparatively unimportant or ineffectual.' " *Id.* at 204. If the judges can censor the content of legislative proposals, they have usurped absolute control over legislative speech and debate.

Respondents have cited language[16] from the Oklahoma Bill of Rights as authority for the proposition that Oklahoma has constitutionally provided for presubmission review of initiative petitions by the judiciary. Respondents have misconstrued the intent of the language quoted. The cited phrase ("be not repugnant to the Constitution of the United States") is a mere reiteration that the federal Constitution "is the supreme law of the land." *See* Okla. Const., art. I, § 1. The limiting language is not repeated in the constitutional provision authorizing the initiative process.

> The Legislative authority of the State shall be vested in a Legislature, consisting of a Senate and a House of Representatives; but the people

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[16] "All political power is inherent in the people; and government is instituted for their protection, security, and benefit, and to promote their general welfare; and they have the right to alter or reform the same whenever the public good may require it: **Provided, such change be not repubnant to the Constitution of the United States.**" Okla. Const. art. II, § 1. (emphasized language cited by Respondents) "Brief for Respondents Feldman and Little in Opposition," p. 10.

> reserve to themselves the power **to propose laws** and amendments to the Constitution, **and to enact or reject the same at the polls** independent of the legislature, and also reserve power at their own option to approve or reject at the polls any action of the Legislature.

Id. at art. V, § 1 (emphasis added). The petitioners' argument, or a logical extension of it, is why the *amici* have filed this brief. Although the constitutional provision authorizing an initiative petition does not contain any proviso about the federal constitution, similar restrictive language is included in a section discussing the legislative powers of the Senate and House.

> The reservation of powers in the initiative and referendum in this article shall not deprive the legislature of the right to repeal any law, propose or pass any measure, **which may be consistent with** the constitution of the state and the **Constitution of the United States.**

Id. at art. V, § 7 (emphasis added). Consequently, if respondent's interpretation of art. II, § 1 gives the Oklahoma Supreme Court the authority to judicially veto proposed initiative petitions, art. V, § 7 would similarly give the Oklahoma Supreme Court the authority to judicially veto proposed legislation pending before the State Legislature. This portending invasion of *amici's* core political speech dramatizes the need to respond to the Oklahoma Supreme Court's breach of the First Amendment.

A judiciary "veto" of proposed legislation is a usurpation not easily reined. Although Oklahoma authorizes impeachment proceedings and periodic ballot retention votes, the only effective limitation on the judiciary is

each jurist's own recognition of the proper judicial function. Without this self-restraint, the people become subject to the whims of an judicial oligarchy answerable to no one.[17] The question is essentially about law. When the legislature, the executive or the judiciary, take action that exceeds the powers granted them, they are violating law, no matter how worthy the goal. Here, the goal of protecting people from "useless debate" is hardly worthy, but rather is paternalistic arrogance.[18] These usurpations inevitably undermine respect for the judiciary and for law.

Fortunately, citizens of Oklahoma have another means of reminding the Oklahoma judiciary of their proper function, to-wit: this court can restore the speech and debate rights guaranteed by the federal Constitution's First and Fourteenth Amendments. Oklahoma's dissenting Chief Justice listed a number of fundamental legal principles (prudential rule, standing, primary jurisdiction, *etc.*) violated by the majority decision. *See In Re Initiative Petition No. 349,* 838 P.2d at 21-22. These principles are not idle technicalities, but rather prudential rules giving form to the boundaries of judicial authority. The proper judicial role is to construe *law,* not to censor *proposed law.* "Judges serve as stewards of constitutional

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[17] *Cf.* "The United States shall guarantee to every stat in this union a republican form of government. . . . " U.S. Const., art. IV, § 4.

[18] Respondents express this same smug disdain for Oklahoma voters. *See, e.g.,* "[invalidation of presubmission review] would amount to a requirement that states stand idly by as a misguided electorate chooses to violate the constitutional rights of their fellow citizens." Respondent's Brief at 11.

purity *in law,* but *do not also function as government agents enforcing constitutional orthodoxy upon the process of law-making." Id.* at 19. As one commentator has remarked on the federal Constitution:

> The Executive and Legislative authorities of the United States have no powers, except as such are expressly conferred on them by the Constitution itself; and, on the other hand, the several states are forbidden by the Constitution to do certain acts and pass certain laws. What then is to be done if these limitations of power are transgressed by any state, or by the United States? The duty of annulling such usurpations is confided by the third article of the Constitution to the Supreme Court, and to such inferior courts as Congress may, from time to time, ordain and establish. But this remarkable power is capable only of indirect exercise; it is called into activity by 'cases,' by actual controversies, to which individuals, or states, or the United States, are parties. The point of unconstitutionality is raised by the arguments in such controversy; the decision of the court follows the view which it takes of the Constitution. **A declaration of unconstitutionality, not provoked by a definite dispute, is unknown to the Supreme Court.**

Henry Sumner Maine, "Popular Government," pp. 216-217 (1976) (emphasis added, footnotes omitted). While this statement may be true of the United States Supreme Court, it most assuredly does not accurately describe the majority of the Oklahoma Supreme Court who filed the opinion below. Their decision was an "excercise of judicial power [that] interferes with the exercise of the political power of the people, acting as our

legislative branch of government." *In Re Initiative Petition No. 349*, 838 P.2d at 15, (Wilson, J., dissenting in part). Like dissenting Justice Alma Wilson, amici "refuse to join in this flagrant encroachment upon the people's legislative powers." *Id.* The First and Fourteenth Amendments protect the public from a judiciary that would use the power to invalidate law "to create a form of court-impressed censorship purging from open and public debate and excising from the marketplace of available ideas *novel* policy solutions that might meet with current judicial disfavor." *Id.* at 19 (Opala, C.J., dissenting). *Amici* join with Chief Justice Opala in declaring that: "Debates on constitutional issues are not judicially bannable from public fora nor are they outside the protection accorded political speech. Judicial pre-enactment scrutiny of proposed legislation for constitutional flaws raises an impermissible restraint on the free exercise of political speech." *Id.*

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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December 14, 1992